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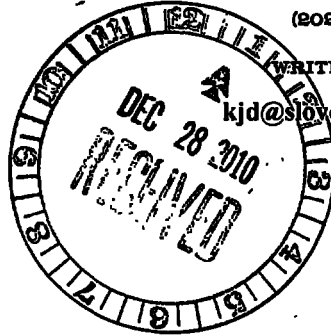
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December 28, 2010

BY HAND DELIVERY

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Docket No. NOR 42128, South Mississippi Electric
Power Association v. Norfolk Southern Railway Company

FILED
DEC 28 2010
SURFACE
TRANSPORTATION BOARD

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding, please find an original and ten (10) copies of South Mississippi Electric Power Association's Complaint. We also are enclosing three disks containing electronic versions of the filing and enclosing the filing fee in the amount of \$350. Finally, we have enclosed an additional copy of the filing to be date-stamped and returned to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for South Mississippi Electric
Power Association

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Office of Proceedings
DEC 28 2010
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Public Record

Enclosures

cc: Counsel for Defendant

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SURFACE
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**SURFACE
TRANSPORTATION BOARD**

SOUTH MISSISSIPPI ELECTRIC POWER
ASSOCIATION
7037 US Highway 49
Hattiesburg, Mississippi 39402,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY
Three Commercial Place
Norfolk, Virginia 23510-2191,

Defendant.



Docket No. NOR 42128

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ORIGINAL COMPLAINT

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SURFACE
TRANSPORTATION BOARD

**SOUTH MISSISSIPPI ELECTRIC
POWER ASSOCIATION**

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Dated: December 28, 2010

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SOUTH MISSISSIPPI ELECTRIC POWER
ASSOCIATION
7037 US Highway 49
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Complainant,

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NORFOLK SOUTHERN RAILWAY
COMPANY
Three Commercial Place
Norfolk, Virginia 23510-2191,

Defendant.

Docket No. NOR 42128

ORIGINAL COMPLAINT

COMES NOW South Mississippi Electric Power Association ("SMEPA"), and complains against Norfolk Southern Railway Company ("NS") pursuant to 49 U.S.C. §§ 11701 and 11704.

By this Complaint, SMEPA seeks the establishment of just and reasonable rates, rules and other terms for unit train coal transportation service in shipper-supplied railcars to SMEPA's R.D. Morrow, Sr. Generating Station ("Morrow"), a coal-fired facility located near Richburg, Mississippi, from: (1) NS-served mine origins and origin groups in Kentucky, Virginia, West Virginia, Tennessee, and Alabama; and (2) NS-served docks at Mobile, AL.

In support hereof, SMEPA states as follows:

THE PARTIES

1. SMEPA is an electric generation and transmission cooperative headquartered in Hattiesburg, Mississippi. SMEPA generates, sells, and transmits bulk supplies of wholesale electricity to its eleven Member-owner electric power associations through more than 1,700 miles of high-voltage transmission lines. SMEPA's Member systems own and maintain approximately 56,200 miles of distribution line and provide service to more than 406,000 homes and businesses in fifty-six of Mississippi's eighty-two counties, which comprise nearly two-thirds of the state's land mass. Because SMEPA and its Members are consumer-owned, not-for-profit businesses, SMEPA's rates reflect only the cost of supplying wholesale electric energy to these rural electric systems.

2. SMEPA's Members serve an area of the country that has endured significant and prolonged economic hardship. The average per capita income of SMEPA's ultimate ratepayers is \$19,620, well below the Mississippi average, which itself is the lowest in the nation. Consequently, NS's excessive rail rates have a particularly onerous impact upon those who can least afford to bear them.

3. SMEPA's primary electric generating resource is the Morrow Station, which is located in Purvis, Mississippi in Lamar County (the southern portion of the state). The two (2) coal-fired units at Morrow currently are each rated at 200 megawatts. The Morrow Station consumes approximately one million tons of coal per year, and as a base load facility operates on a nearly continuous basis.

4. NS is a common carrier by railroad engaged in the transportation of freight in interstate commerce. NS is subject to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, codified at 49 U.S.C. § 10101, *et seq.*, and to the jurisdiction of the Board. As further described *infra*, rail transportation is the only feasible means of delivering large volumes of coal to the Morrow Station, and rail access to the Morrow Station is completely controlled by NS. As such, NS enjoys market dominance over SMEPA's essential coal transportation, and SMEPA has no other current transportation option for delivering its coal purchases. NS exerts sole control over the establishment of rates, rules and other terms covering the transportation of coal to Morrow.

5. The Board found NS to be revenue adequate within the meaning of 49 U.S.C. §10704(a)(2) and (3) in each of its annual determinations from 2004 through 2008. *See Railroad Revenue Adequacy – 2008 Determination*, STB Ex Parte No. 552 (Sub-No. 13) (STB served Oct. 26, 2009) (NS's 13.75% return on net investment ("ROI") exceeds the 11.75% cost of capital ("COC") for the railroad industry); *Railroad Revenue Adequacy – 2007 Determination*, STB Ex Parte No. 552 (Sub-No. 12) (STB served Sept. 26, 2008) (NS's 13.55% ROI exceeds the 11.33% industry COC); *Railroad Revenue Adequacy – 2006 Determination*, STB Ex Parte No. 552 (Sub-No. 11) (STB served May 6, 2008) (NS's 14.36% ROI exceeds the 9.94% industry COC); *Railroad Revenue Adequacy – 2005 Determination*, STB Ex Parte No. 552 (Sub-No. 10) (STB served Oct. 23, 2006) (NS's 13.21% ROI exceeds the 12.2% industry COC); *Railroad Revenue Adequacy – 2004 Determination*, STB Ex Parte No. 552 (Sub-No. 9) (STB

served Nov. 23, 2005) (NS's 11.64% ROI exceeds the 10.1% industry COC). While the Board did not find NS to be revenue adequate for the single year 2009, a year marked by a severe general decline in the U.S. economy, on information and belief NS again will be shown to be revenue adequate in 2010. Moreover, when considered on a net basis over the entire seven (7) year period, NS has earned and continues to earn adequate revenues as defined under the governing statute.

COAL TRANSPORTATION TO MORROW

6. All of the coal consumed at Morrow is delivered by rail, which is the only feasible means of transporting the volumes involved. Most of the coal for the Morrow Station originates at several mines in Central Appalachia (principally in the Interstate and Thacker NS origin districts), which are located over 800 miles from Morrow.

7. NS has delivered all coal consumed at Morrow since it commenced commercial operation in 1978. For many years, all coal shipped to the station has been transported by NS pursuant to a series of contracts that SMEPA negotiated with NS and entered into pursuant to 49 U.S.C. § 10709 and its predecessor statute. In order to facilitate that service, SMEPA acquired a fleet of railcars, and has supplied the railcars to NS to for use in transporting coal to Morrow. The NS transportation contract currently in effect, which is denominated as Contract C-9376, will expire on December 31, 2010.

SMEPA'S EFFORTS TO SECURE REASONABLE RATES AND SERVICE TERMS

8. In anticipation of the need for unit train coal service after 2010, and consistent with its own internal fuel budgeting requirements, SMEPA opened negotiations with NS over terms and conditions for a possible extension of or successor agreement to Contract C-9376 substantially in advance of the December 31, 2010 expiration date. Despite concerted efforts expended over several months, however, the parties were not able to reach agreement, due principally to widely divergent positions regarding what constitutes reasonable rates and service terms for the coal transportation at issue.

9. With no alternatives available, and faced with a continuing and urgent need for reliable projections of its 2010 fuel supply and transportation costs, SMEPA made a written request to NS on October 8, 2010 for the establishment or disclosure of the rates and service terms that NS would apply to the transportation of coal to the Morrow Station in common carriage in shipper-supplied railcars, commencing January 1, 2011.

10. On December 10, 2010, NS provided common carrier rate quote NSRQ 65837, which by its terms contains rates and rules for coal transportation service from various NS coal origin districts to the Morrow Station, and incorporates other NS tariffs and publications containing additional rules, accessorial charges and other

provisions applicable to NS coal service. A copy of NSRQ 65837 is attached to this Complaint as Exhibit A.

11. NS's common carrier rates for service to Morrow in shipper-supplied cars, as set forth in NSRQ 65837, are as follows:

	<u>Origin District/Loading Point</u>	<u>Rate</u>
A.	Alabama 2 and 4	\$32.48 ¹ \$33.89 ²
B.	Mobile (Alabama State Docks)	\$33.95 ²
C.	Interstate, CV1, CV2, St. Charles and Tiller	\$39.25 ¹ \$40.64 ²
D.	Middlesboro, Oneida, TN and Turley, TN	\$41.95 ¹ \$42.66 ²
E.	Thacker I and II	\$42.05 ¹ \$43.44 ²
F.	Kenova	\$44.27 ¹ \$45.67 ²
G.	Virginian, Kanawha, Pocahontas, Tug River and Upper Buchanan	\$46.72 ¹ \$48.11 ²

¹ Applies to origins capable of loading a full train within 4 hours.

² Applies to origins capable of loading a full train within 24 hours.

**NS POSSESSES MARKET DOMINANCE
OVER COAL TRANSPORTATION TO MORROW**

12. Morrow consumes approximately 1,000,000 tons of coal each year.

The vast preponderance of this coal does and will continue to originate at mines that are at least 800 miles away from the station. There are no navigable waterways by which coal feasibly could be delivered to the station. The only practical means by which the SMEPA coal volumes can be delivered to the Morrow Station is via rail.

13. NS is the only railroad that is capable of providing coal delivery service to Morrow. Accordingly, NS possesses “qualitative” market dominance over SMEPA’s coal movements under 49 U.S.C. § 10707.

14. All common carrier transportation rates established by NS in NSRQ 65837 are substantially in excess of 180% of the variable cost of the associated service. Accordingly, the market dominance jurisdictional threshold established under 49 U.S.C. § 10707(d) is satisfied.

15. Because NS possesses market dominance over coal transportation to Morrow, the Board has jurisdiction to adjudicate the reasonableness of NS’s rates, rules and practices applicable to that transportation.

**NS's RATES, CHARGES AND SERVICE
RULES ARE UNREASONABLE AND UNLAWFUL**

16. The common carrier transportation rates established by NS in NSRQ 65837 as applied to SMEPA's coal traffic exceed the maximum reasonable levels permitted under 49 U.S.C. §§ 10107(d)(1) and 10702, and therefore are unlawful.

17. In accordance with 49 C.F.R. Part 1111.1(a), the reasonableness of NS's rates should be examined using the Constrained Market Pricing principles set forth in *Coal Rate Guidelines - Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987) ("*Guidelines*"), as subsequently interpreted and applied in proceedings before the Board. This is so because coal shipments to Morrow via NS involve high volume, repetitive unit train traffic.

18. NS's rates are excessive and unreasonable both under the revenue adequacy constraint and the stand-alone cost constraint of the Board's *Guidelines*.

19. NSRQ 65837 and the tariffs, circulars and publications referenced therein also include service terms which do not meet SMEPA's legitimate coal transportation needs, and constitute a departure from the established pattern of service provided by NS for coal deliveries to the Morrow Station, which reflected NS's clear understanding of SMEPA's reasonable transportation requirements. SMEPA reserves the right to present evidence of the unlawfulness of one or more of those terms if, as applied to coal service to SMEPA, they result in unreasonable charges and/or constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746.

20. This Complaint shall be deemed to apply to and likewise challenge any changes to the provisions of NSRQ 65837, or any tariffs, circulars or publications referenced therein, as well as to any new tariffs, circulars, rates or charges that might be established by NS and applied to coal transportation service to the Morrow Station.

21. Neither this proceeding nor the granting of the relief requested herein will constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources.

WHEREFORE, Complainant SMEPA prays that Defendant NS be required to answer the charges herein, and that after a hearing and investigation conducted pursuant to 49 U.S.C. § 10704(a)(1) and the Board's implementing regulations, the Board: (1) find that NS possesses market dominance over the subject coal transportation, pursuant to 49 U.S.C. § 10707; (2) find the challenged rates, charges, rules and practices to be unreasonable in violation of 49 U.S.C. §§ 10701(d)(1), 10702 and/or 10746; (3) prescribe lawful maximum rates and charges, and reasonable rules and practices, as requested by SMEPA and demonstrated by the evidence to be adduced herein; (4) award damages to SMEPA pursuant to 49 U.S.C. § 11704(b), to be calculated based on the record of this proceeding, with compensatory interest; and (5) grant to SMEPA such other and further relief as the Board may deem proper based on said record.

Respectfully submitted,

**SOUTH MISSISSIPPI ELECTRIC
POWER ASSOCIATION**


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Dated: December 28, 2010

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Attorneys & Practitioners

NSRQ 65837

Effective Date – January 1, 2011

Route – NS Direct

Origin – Loading points on NS per the Origin Districts set forth in Appendix A ("Origins" and any individual loading point an "Origin")

Destination – Plant Morrow, Richburg, MS ("Destination")

Equipment – Shipper supplied rail cars (Private Cars) as defined in Appendix B and Appendix C.

Shipment Size – As specified in Appendix A.

Commodity - Coal and/or coal-based synfuel (collectively, "Commodity")

Common Carrier Transportation Rates – Common Carrier Transportation Rates for coal shipments shall be on a per net ton as shown on Appendix A. Common Carrier Transportation Rates are shipment size and mine origin specific and are only applicable when an Origin can meet the Shipment Characteristics shown in Appendix A.

Applicable Tariffs and Conditions – Shipments moving under the terms of this NSRQ are subject to all classifications, tariffs or successor documents, and all government, AAR and carrier rules and regulations. This shall specifically include, but shall not be limited to, NS Conditions of Carriage #2-J, all NS Tariffs and Conditions listed therein and any supplements thereto or successor version thereof; provided however, that no fuel surcharge shall apply to the rates contained in this NSRQ.

APPENDIX A

**Base Rates for Private Cars
286,000 Pound Load Limit
Destination – Richburg, MS**

Origin District	Shipment Characteristics	
	Number of cars, Loading Time (at one Origin) & Resulting Designation	Rate Per Net Ton
Alabama 2, Alabama 4	72 cars (4 hours), Rapid Trainload	\$32.48
Alabama 2, Alabama 4	70-72 cars (24 hours), Trainload	\$33.89
Mobile (Alabama State Docks)	85-103 cars (24 hours), Trainload	\$33.95
Interstate, CV1, CV2, St. Charles, Tiller	103 cars (4 hours), Rapid Trainload	\$39.25
Interstate, CV1, CV2, St. Charles, Tiller	85-103 cars (24 hours), Trainload	\$40.64
Middlesboro, Oneida, TN, Turley, TN	103 cars (4 hours), Rapid Trainload	\$41.95
Middlesboro, Oneida, TN, Turley, TN	85-103 cars (24 hours), Trainload	\$42.66
Thacker I, Thacker II	103 cars (4 hours), Rapid Trainload	\$42.05
Thacker I, Thacker II	85-103 cars (24 hours), Trainload	\$43.44
Kenova	103 cars (4 hours), Rapid Trainload	\$44.27
Kenova	85-103 cars (24 hours), Trainload	\$45.67
Virginian, Kanawha, Pocahontas, Tug River, Upper Buchanan	103 cars (4 hours), Rapid Trainload	\$46.72
Virginian, Kanawha, Pocahontas, Tug River, Upper Buchanan	85-103 cars (24 hours), Trainload	\$48.11

APPENDIX B

Private Cars

Private Cars. Cars shall be supplied by Shipper for use in transportation service hereunder ("Private Cars") and shall be: (i) provided per diem-free and mileage-free and otherwise at no cost to NS; (ii) aluminum rapid discharge rail cars, where each car shall have a 286,000 pound gross weight on rail load limit; (iii) of sufficient capacity to carry a minimum lading weight of not less than 116 net tons; (iv) 54 feet or less in length; (v) qualified for and granted OT-5 authority, provided that all cars are and remain mechanically acceptable to NS for rail operation; (vi) listed in Appendix C; and (vii) subject to the following conditions:

- (a) All Private cars will be held at Plant Morrow at Richburg, MS except for the two 100 car trains. Replacement cars for bad-order cars will be switched into trains at the plant and NS will not provide line of road switching of replacement cars for bad orders. Bad-order cars will be repaired and returned to the train service as the cars are repaired. If SMEPA fails to keep the trains at the required 100 cars, SMEPA shall be required to pay the minimum train weight charge.

APPENDIX C

**Qualified Shipper–Supplied Private Cars
With a Load Limit of 286,000 pounds gross weight on rail**

SMEX 5001 – 5120

SMEX 6001 - 6100

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. Part 1111.3, I hereby certify that this 28th day of December, 2010, I caused a copy of the foregoing Original Complaint to be served on the Chief Legal Officer of the Defendant via overnight courier at the following address:

James A. Hixon, Esq.
Executive Vice President Law
and Corporate Relations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510

A handwritten signature in black ink, appearing to read 'K. Dowd', is written over a horizontal line.

Kelvin J. Dowd